



D7

U.S. Department of Justice

Immigration and Naturalization Service

Identification data deleted to
prevent clearly unwarranted
invasion of personal privacy.

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC-99-057-52513

Office: Vermont Service Center

Date: 11 MAR 2002

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rose
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: This is a motion to reconsider the Associate Commissioner for Examination's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decision of the director will be affirmed. The previous decision of the Associate Commissioner will be affirmed in part. The petition will be denied.

The petitioner is engaged in the import and export of surgical instruments. Information contained in the record indicates that the beneficiary was approved for classification as an L-1 intracompany transferee from December 12, 1995 until June 30, 1997. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive manager. The director determined that the petitioner had not established that the beneficiary has been and will be employed primarily in a managerial or executive capacity. The director's decision was affirmed by the Associate Commissioner for Examinations on appeal.

The Commissioner also stated in his decision that the petitioner had not established that there is a qualifying relationship between the U.S. and foreign entities, or that the foreign entity is doing business.

On motion, the petitioner states that the evidence on record clearly establishes that the beneficiary has been in a managerial and executive position throughout his employment. The petitioner also states that there is a qualifying relationship between the U.S. and foreign entities.

To establish L-1 eligibility under Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

The first issue in this proceeding is whether the beneficiary has been and will continue to be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On motion, the petitioner has not submitted any additional evidence which demonstrates that the beneficiary has been and will continue

be employed in a primarily managerial or executive capacity. There is no sufficient evidence to establish that the petitioner employs a subordinate staff of professional, managerial, or supervisory personnel in the United States who will relieve the beneficiary from performing nonqualifying duties. The petitioner's 1996, 1997 and 1998 income tax returns indicate that the beneficiary was the sole employee. The tax returns also reveal that no salaries and wages were paid out during the 1996 and 1997 tax years and in 1998, only \$1,500 was paid out in salaries and wages, specifically, for legal fees.

On motion, the petitioner states " We have started recruiting staff now and an administrative assistant appointed since January 1999 and four more staff members shall be appointed by June 2000." The petitioner also states that it has the services of contractors and agents. The petition was filed on December 15, 1998. Therefore, the information submitted on motion regarding new employees does not demonstrate the staffing of the petitioning entity at the time the petition was filed and may not be considered in this proceeding. 8 C.F.R. 103.2(b) (13).

One of the issues raised by the Commissioner in his decision was whether a qualifying relationship exists between the United States and foreign entity.

The regulations at 8 C.F.R. 214.2(l) (1) (ii) (G) states:

Qualifying relationship means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1) (1) (ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a) (15) (L) of the Act.

The regulations at 8 C.F.R. 214.2(l) (ii) (K) states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or

owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulations at 8 C.F.R. 214.2(l)(ii)(L) states, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioning entity, K.T.A. Instruments, Inc., is authorized to issue 200 shares of its stock. A copy of the stock certificate contained in the record indicates that the foreign entity, K.T. Surgico, owns 102 shares of the petitioning entity's stock. Therefore, a subsidiary relationship exists between the U.S. and foreign entities.

Another issue raised by the Commissioner in his decision concerned whether the foreign entity was doing business. The petitioner has not submitted any additional evidence on motion and states only that "our parent firm is exporting surgical instruments to USA." Absent financial evidence, the petitioner has not established that the foreign entity continues to be "doing business" as defined by regulation.

In conclusion, the petitioner has not established that the beneficiary has been or will continue to be employed in a primarily managerial or executive capacity. The petitioner has not established that the foreign entity is doing business. Finally, the petitioner has established that the U.S and foreign entities are qualifying organizations.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The Associate Commissioner's decision of March 28, 2000 is affirmed in part. The petition is denied.